GAO

United States General Accounting Office

Report to the Honorable
Robert W. Kasten, Jr., U. S. Senate

September 1988

GOVERNMENT SPACE LEASING

Commercial Lease of Space at the John F. Kennedy Federal Building in Boston

GAO/GGD-88-134

GAO

United States
General Accounting Office
Washington, D.C. 20548

B-231277

September 30, 1988

The Honorable Robert W. Kasten, Jr.
United States Senate

Dear Senator Kasten:

This report responds to your May 16, 1988, letter requesting us to investigate procedures used by the General Services Administration (GSA) in 1983 to lease government-owned space within the John F. Kennedy Federal Building in Boston, Massachusetts, to a nonfederal tenant for a camera and photography shop. You also expressed concern about the legal authority for locating within a federal facility a private business that competes with another private business in the immediate neighborhood.

We limited our review to an examination of the text and history of relevant legislation on this matter and an examination of the results and current status of previous investigations and determinations on this particular case by GSA, the Department of Justice, and a U.S. District Court. The results of our review are summarized below and, along with our scope and methodology, are discussed in more detail in the appendix.

Results in Brief

The Public Buildings Cooperative Use Act of 1976 authorizes GSA to lease space in federal buildings for commercial purposes, even though in a particular case a commercial activity may compete with other businesses in the vicinity. The GSA 1983 leasing of the space in the John F. Kennedy Federal Building has been explored and has been determined proper by GSA's Office of Inspector General, GSA's Office of General Counsel, GSA's Public Buildings Service, the Department of Justice, and a U.S. District Court. GSA has issued a chapter to its handbook, since the 1983 lease, to establish guidelines and procedures for commercial leasing of government-owned space under the Public Buildings Cooperative Use Act of 1976.

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GSA's Procedures in the 1983 Leasing of the Government-Owned Space to a Nonfederal Tenant Have Been Determined Proper

There have been several investigations of the procedures used by GSA in leasing space in the John F. Kennedy Federal Building to a camera and photography shop in 1983. Each has concluded that the 1983 lease was awarded through proper procedures.

GSA's Office of Inspector General determined, after two investigations of this matter, that there was no evidence of wrongdoing and that the leasing of the government-owned space to a nonfederal tenant was done in accordance with established procedures. In addition, the GSA General Counsel and the Counsel to the GSA Inspector General, in responding to inquiries from, and on behalf of, Mr. Ira Kaye, who operates Government Center Camera, Inc., located near the federal building, concluded that the lease was properly awarded and is legally correct. Furthermore, the Department of Justice also examined allegations made by Mr. Kaye regarding potential criminal misconduct by GSA in this matter and concluded that they were without merit. We also note that Mr. Kaye brought civil suit in the U.S. District Court for the District of Massachusetts protesting GSA's lease of the space and that the Court dismissed most of the complaints in a preliminary hearing.

We have reviewed the records of these various investigations, and we believe that the issues have been fully explored. None of the investigations revealed improprieties in the procedures followed by GSA in leasing the John F. Kennedy Federal Building space to a nonfederal tenant. Further review, in our opinion, would be unlikely to result in a different conclusion.

GSA's Leasing of Federal Space to a Commercial Enterprise That Competes With Neighborhood Businesses Is Authorized

You were also concerned about the legal authority for locating within a federal facility a private business that competes with another private business located in the immediate neighborhood. GSA's General Counsel has determined that the Public Buildings Cooperative Use Act of 1976 authorizes the leasing of space in federal buildings for commercial activities similar to commercial activities existing in the vicinity. We reviewed the act and its legislative history and determined that it authorizes GSA to lease space in federal buildings for commercial purposes, even though in a particular case a commercial activity may compete with other businesses in the vicinity. Thus, we agree with the GSA General Counsel's finding.

Since the 1983 lease, GSA has supplemented its policy guidance on commercial leasing of government-owned space under the Public Buildings Cooperative Use Act of 1976 to take into account the potential effect on

local businesses and to assure that all businesses similar to those proposed for federal buildings will have an equal opportunity to participate in the leasing process.

As arranged with your office, we did not obtain official agency comments on this report. We are sending copies of this report to the Administrator of General Services and to others with an interest in this subject. Copies of this report will also be made available to others upon request.

Sincerely yours,

L. Nye Stevens

L. Nye Stevens
Associate Director

Examinations of the Leasing of Space at the John F. Kennedy Federal Building in Boston, Massachusetts

Objectives, Scope, and Methodology

Senator Robert W. Kasten, Jr., in a May 16, 1988, letter asked GAO to investigate alleged improper practices followed by GSA in the 1983 leasing of space within the John F. Kennedy Federal Building in Boston, Massachusetts, to a camera and photography shop. He also inquired about the legal authority for GSA's policy of locating within a federal facility a private business that competes with another private business located in the immediate neighborhood.

In response to the Senator's request, we contacted GSA during June and July 1988 and determined that several previous investigations by GSA's Office of Inspector General and the Department of Justice, a U.S. District Court ruling, and GSA responses to previous inquiries on this matter have addressed the procedures followed by GSA in regard to this particular case. We also analyzed the legal authority for locating private businesses in federal facilities, and we reviewed an opinion by the GSA General Counsel addressing this issue. In view of the intensive scrutiny this matter has received, we limited our review to the records of investigation and the analyses already done, supplemented by updated information obtained from GSA officials at its headquarters in Washington, D.C. Our review was made in accordance with generally accepted government auditing standards.

GSA Office of Inspector General Investigations

Shortly after the space in the John F. Kennedy Federal Building was leased in November 1983, Mr. Ira Kaye of Government Center Camera, Inc., a retail camera store located across the street from the federal building, registered complaints about the lease to various government officials. Mr. Kaye alleged that GSA was guilty of a lack of ethics, lack of competition, possible fraud, and inside influence. In view of the nature of the allegations of impropriety and possible fraud made by Mr. Kaye, the GSA Office of Inspector General initiated an investigation. The investigation resulted in a report dated March 15, 1984. The Office of Inspector General determined that there was no evidence of wrongdoing and that the leasing of the space at the John F. Kennedy Federal Building was done in accordance with established procedures. A second investigation was initiated on the basis of additional allegations made by Mr. Kaye and resulted in a second report dated August 23, 1984. The Commissioner of the Public Buildings Service, on the basis of his review of both reports, concluded that no wrongdoing occurred and that the lease was awarded in accordance with all applicable regulations and procedures.

Department of Justice Investigation

The Department of Justice has also examined allegations made by Mr. Kaye regarding potential criminal misconduct in this matter. The Federal Bureau of Investigation (FBI) initiated a preliminary inquiry, reviewed the March 1984 Inspector General Report of Investigation, and discussed the matter with the U.S. Attorney in Boston. The FBI concluded in a July 1984 letter to GSA that the matter had been properly and thoroughly investigated by the GSA Office of Inspector General and that the allegations as presented by Mr. Kaye in this instance had been completely refuted. The U.S. Attorney's Office told Mr. Kaye in July 1985 that no further criminal investigation or action appeared to be warranted.

U.S. District Court Ruling

Government Center Camera, Inc., brought civil suit in September 1987 in the U.S. District Court for the District of Massachusetts challenging the manner in which GSA leased the space in the John F. Kennedy Federal Building for the camera and photography shop in 1983. Government Center Camera, Inc., challenged the bidding process used to award the lease as well as its legitimacy, alleged that the bidding process was not done in accordance with federal rules and regulations, alleged conspiracy and unlawful agreement to award the lease, and alleged a conspiracy by GSA officials in deliberately failing to uncover the truth during subsequent investigations of the matter. The suit action brought by Government Center Camera, Inc., was for injunctive and declaratory relief as well as damages.

On November 5, 1987, the U.S. District Court denied Government Center Camera, Inc.'s, motion for a preliminary injunction to prohibit GSA from continuing to lease the space because the plaintiff had not made an adequate showing of irreparable injury. On January 28, 1988, the court dismissed all complaints, except Government Center Camera, Inc.'s, claim that the property was illegally leased at a rate that was below fair market value. Government Center Camera, Inc., was also allowed 60 days to file an amended complaint with the requisite evidence to support its allegations of racketeering activity under provisions of the Racketeer Influenced and Corrupt Organizations Act. GSA told us that as of mid-August 1988, Government Center Camera, Inc., had not taken any legal action to pursue either of these claims.

The Court ruling allowing Government Center Camera, Inc., to pursue its claims that GSA leased the property at a below market rate was based on the allegation that GSA had leased the property at $61,000, although the fair market rental value of the property was appraised at $61,000. GSA

told us that the accepted bid ensured that the government would receive 10 percent of gross sales, with a $6,000 annual guarantee. According to GSA, under the terms of the 1983 lease, the government has been paid an average annual rent of about $15,500 for the years 1984 through 1987.

Commissioner of the Public Buildings Service Examination

The Commissioner of the Public Buildings Service advised Mr. Kaye in December 1987 that the Public Buildings Cooperative Use Act of 1976 authorizes GSA to lease pedestrian access space in federal buildings for commercial, cultural, educational, or recreational activities. The Commissioner said that after a thorough review of the policy in effect in 1983, the lease was found to be fully consistent with the Public Buildings Cooperative Use Act of 1976. The Commissioner further said that as a result of its review and in consideration of the views expressed by Mr. Kaye, GSA supplemented its policy on the process of leasing government-owned space to nonfederal tenants. The purpose was to intensify competition and to provide reasonable assurance that all businesses similar to those proposed for location in federal buildings will have an equal opportunity to participate in the leasing process. The Commissioner also informed Mr. Kaye that he will be notified of any future opportunities to lease space from the government in the Boston area. The Commissioner issued a chapter to a GSA handbook in September 1987 to establish guidelines and procedures for leasing of space under the Public Buildings Cooperative Use Act of 1976.

The Counsel to the Inspector General Examination

The Counsel to the GSA Inspector General reviewed Mr. Kaye's continued complaints of possible irregularities, and in October 1986 the Counsel found no additional information to indicate improprieties in the award of the 1983 lease. The Counsel addressed the fundamental issues of law concerning this matter, specifically, whether there was legal authority to execute the lease and whether it was executed in accordance with that authority. The Counsel found that there was such authority, that the lease was properly executed, and that the procedures and regulations that Mr. Kaye alleged were violated did not apply to the lease at issue. In February 1987, the Counsel concluded that further investigation of the matter was inappropriate and unjustified.

GSA General Counsel Examination

Following inquiries to GSA by Mr. Howard R. Davia, serving as a consultant on behalf of Mr. Ira Kaye, the GSA General Counsel determined that Mr. Kaye's complaints had been carefully considered and that the 1983 lease was properly awarded and legally correct. The General Counsel

informed Mr. Davia in April 1987 that the lease was entered into under the authority contained in the Public Buildings Cooperative Use Act of 1976, the availability of space was properly advertised in a local newspaper, offers to lease were received, and the offer most advantageous to the government was accepted.

Specifically, the General Counsel noted that the authority to lease space in federal buildings for commercial activities is contained in subsection 104(a) of the Public Buildings Cooperative Use Act of 1976, which authorizes GSA "... to enter into leases of space on major pedestrian access levels ... of any public building with persons, firms, or organizations engaged in commercial, cultural, educational, or recreational activities ..." and provides that the rental for such space shall be equivalent to the prevailing commercial rate for comparable space devoted to a similar purpose in the vicinity of the public building. The General Counsel noted that this authority contemplates, by its terms, that GSA will lease space in federal buildings for purposes similar to commercial activities existing in the vicinity.

The General Counsel informed Mr. Davia in April 1987 that in view of the foregoing, there is no legal basis to support any sort of settlement with Mr. Kaye. In the Counsel's view, further attempts to pursue the matter administratively would prove to be futile.

Other Inquiries

In addition to advising Mr. Kaye of the results of their investigations, GSA officials have responded to other inquiries on behalf of Mr. Kaye concerning this particular matter. These have included inquiries by the White House Office of the Vice President and the Chairman of the Subcommittee on Civil Service, Post Office, and General Services, Senate Committee on Governmental Affairs. In its responses, GSA has said that the 1983 lease was properly awarded and is under the authority of the Public Buildings Cooperative Use Act of 1976.

GAO Examination of Locating Private Businesses in Federal Facilities

We also examined the issue of locating private businesses in federal facilities that may compete with other nearby private businesses. We interpreted the Public Buildings Cooperative Use Act of 1976, specifically subsection 104(a) of that act, 40 U.S.C. 490(a)(6), as authorizing GSA to lease space in federal buildings for commercial purposes, even though in a particular case a commercial activity may compete with other businesses in the vicinity.

An advocate of Government Center Camera, Inc., has asserted that subsection 102(a)(3) of the Public Buildings Cooperative Use Act of 1976 limits GSA's authority to lease space to commercial enterprises. On the basis of this conclusion, the advocate implies that such activities should not compete with, or otherwise harm, existing small businesses. Subsection 102(a)(3) of the act says, in part, that GSA shall provide space, facilities, and activities that encourage public access to public buildings so that "... such activities complement and supplement commercial, cultural, educational, and recreational resources in the neighborhood of public buildings. ..." (Underscoring added.) While use of the word "complement" could be read as calling for GSA to consider the competitive effect that a particular commercial lease may have on businesses in the vicinity, we do not believe that this language amounts to an absolute restriction against entering into a commercial lease under such circumstances. Our review of the legislative history of this provision revealed no indication that such a restriction was intended; indeed, the pertinent committee reports (S. Rep. No. 94-349 (1975) and H. R. Rep. No. 94-1584, Part 2 (1976)) do not mention whether any consideration needs to be given to the competitive effect that a commercial lease of government-owned space may have on neighboring businesses.

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